


Spring 2019

Devotion to and the Rule of Law: Acknowledging the Role of Religious Values in Judicial Decision-Making

Priya Purohit

Indiana University Maurer School of Law, priyanpurohit@gmail.com

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>

 Part of the [First Amendment Commons](#), [Fourteenth Amendment Commons](#), [Fourth Amendment Commons](#), [Religion Law Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Purohit, Priya (2019) "Devotion to and the Rule of Law: Acknowledging the Role of Religious Values in Judicial Decision-Making," *Indiana Law Journal*: Vol. 94 : Iss. 2 , Article 9.

Available at: <https://www.repository.law.indiana.edu/ilj/vol94/iss2/9>

This Comment is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

DEVOTION TO AND THE RULE OF LAW: ACKNOWLEDGING THE ROLE OF RELIGIOUS VALUES IN JUDICIAL DECISION-MAKING

PRIYA PUROHIT*

I.	INSTITUTIONALIZED RELIGION AS THE GATEKEEPER TO THE JUDICIARY	731
II.	AN OVERVIEW OF THE DEBATE SURROUNDING THE ROLE OF RELIGION IN JUDICIAL DECISION-MAKING.....	735
	A. AGAINST THE ROLE OF RELIGION IN JUDICIAL DECISION-MAKING	735
	B. IN FAVOR OF THE ROLE OF RELIGION IN JUDICIAL DECISION-MAKING.....	738
	1. PARALLELS BETWEEN RELIGIOUS VALUES AND SECULAR VALUES	739
	2. THE INTELLECTUAL VALUE OF RELIGIOUS TEACHINGS AND TRADITIONS	740
	3. THE MYTH OF THE SECULAR JUDGE.....	741
III.	RECOMMENDATIONS	745
	A. PROPOSED AMENDMENTS TO RULE 2.4 OF THE ABA’S MODEL CODE OF JUDICIAL CONDUCT	745
	B. PROPOSED AMENDMENTS TO CANON 3 OF THE CODE OF CONDUCT FOR UNITED STATES JUDGES	747
	1. CANON 3(A)(1)	747
	2. CANON 3(C)(1)	748
	CONCLUSION.....	748

On Tuesday, August 16, 2017, Roy Moore,¹ seventy-year-old U.S. Senate-hopeful and former (though perhaps *ousted* is more appropriate) Chief Justice of the Alabama Supreme Court, trotted to the polls atop his horse, a brown and white Tennessee walker named Sassy, to cast his vote in Alabama’s Senate Republican

* Priya N. Purohit. J.D., Indiana University–Bloomington, Maurer School of Law, 2018. Thank you to my mentor, Professor Charles Geyh, for his intellectual generosity, for dreaming up the seminar from which this Comment sprung forth, and for his friendship. Thank you to the Indiana Law Journal editorial board for their skillful edits and thoughtful suggestions—with special thanks to Editor-in-Chief extraordinaire, Hannah Miller. Finally, thank you to my parents, Smita and Narayan, and my husband-to-be, Hans, for their unwavering love and support. All views expressed, and errors, are my own.

1. This Comment was written before the sexual misconduct allegations surfaced against Roy Moore, and before now-Senator Doug Jones defeated Moore in the December 2017 Alabama special election. However, even before the sexual misconduct allegations arose, Moore was still grossly unfit to serve as a judge on the Alabama Supreme Court *or* in the U.S. Senate. Because this Comment addresses the subject of *religion* and the judiciary, I do not address the effect of those allegations on Moore as either a former judge or as a candidate for U.S. Senate.

primary.² Clad in a black cowboy hat, black cowboy boots, blue jeans, and a fitted black t-shirt bearing the phrase “MILITARY POLICE,” Moore dismounted his horse and told the throng of reporters that he and his wife Kayla—also on horseback—“look[ed] forward to registering [their] vote to make this country great again.”³ Moore continued, “I appreciate the people understanding that it’s not the money from Washington that will buy us this election, it’s the people of Alabama that are going to vote in this election.”⁴ Although Moore did not reach the majority support threshold that Tuesday, he did beat sitting U.S. Senator Luther Strange a little over a month later in the GOP Senate Runoff.⁵

The crux of Moore’s ultimately failed Senate campaign was that “removing the sovereignty of a Christian God from the functions of government is an act of apostasy, an affront to the biblical savior as well as the Constitution.”⁶ Moore’s still-accessible campaign website details his lifelong dedication to “acknowledg[ing] the sovereignty of God.”⁷ In fact, even his removals from office are couched in the unmistakable language of religious conviction—Moore was punished for his twin decisions to “acknowledge the sovereignty of God”⁸ and “uphold[] the sanctity of marriage as between one man and one woman.”⁹ But, as politicians often do, Moore misses the point.

Moore was not removed twice from judicial office because he acknowledged the sovereignty of the Judeo-Christian God; he was removed twice from office because he refused to set aside his subjective interpretation that the Judeo-Christian God is the moral foundation of the laws of the United States.¹⁰ With Moore serving, unfortunately, as the uniquely unlikeable mascot of those who would dare to bring religion into the judicial decision-making process, it is both easy and popular to argue that because judges are first and foremost public officers, they should be prohibited from invoking religious values in their decision-making. As a state actor, anything

2. Emily Tillett, *Candidate Arrives to Polls on Horseback to Cast Alabama Primary Vote*, CBS NEWS (Aug. 15, 2017, 1:44 PM), <https://www.cbsnews.com/news/candidate-arrives-to-polls-on-horseback-to-cast-alabama-primary-vote/> [https://perma.cc/P733-M58S].

3. AL.com, *Roy Moore Rides in to Vote*, YOUTUBE (Aug. 15, 2017), <https://www.youtube.com/watch?v=GzBrcCOTQQQ&feature=youtu.be> [https://perma.cc/DM8L-Q2PM].

4. *Id.*

5. Eric Bradner, *Roy Moore Wins Alabama Senate GOP Primary Runoff*, CNN POLITICS (Sept. 27, 2017, 2:38 PM), <http://www.cnn.com/2017/09/26/politics/alabama-senate-results-roy-moore-luther-strange/index.html> [https://perma.cc/P733-M58S].

6. Michael Scherer, *Roy Moore Disrupts U.S. Senate Race in Alabama – and Prepares for New Level of Defiance in Washington*, WASH. POST (Sept. 21, 2017), https://www.washingtonpost.com/politics/roy-moore-disrupts-alabama-senate-race--and-prepares-for-new-level-of-defiance-in-washington/2017/09/21/2a88a4a2-9e38-11e7-9083-fbfdddf6804c2_story.html?utm_term=.1d74a993fb06 [https://perma.cc/PS93-FURS].

7. JUDGE ROY MOORE U.S. SENATE, <https://www.roymoore.org/> [https://perma.cc/P9EF-BBYR].

8. *Id.*

9. *Id.*

10. See Shaun Marker, “*It’s Time for Roy’s Rock to Roll*” . . . *After the Court of the Judiciary Speaks, Roy and His Rock, Roll*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 431, 442 (2005) (citation omitted).

that the judge does bears the stamp of the government. And the government, per the Constitution, must remain neutral when it comes to matters of religion.¹¹ Of course, it is a problem when even a former judge such as Moore, several months after his suspension from judicial office for defying federal court orders concerning same-sex marriage,¹² appears on a pastor's radio show proclaiming that when God's law conflict with man's law, "God's laws are always superior."¹³ The problem grows ever larger when Moore, speaking at a luncheon hosted by Pro-Life Mississippi, declares that the First Amendment only protects the religious speech of Christians.¹⁴

But Moore, despite his national prominence, is the exception when it comes to judicial officers who invoke religious values in judicial decision-making—not the norm. First, by all accounts, judges who are twice removed from office for failure to adhere to the U.S. Constitution rarely mount (at least initially) successful campaigns for legislative office. The idiosyncratic events that unfolded in Alabama in the fall of 2017 are not at all indicative of a rising trend across the fifty states.¹⁵ Second, Moore's adversarial conception of the relationship between law and Christianity is not the only manner by which religion and law can interact. In fact, as this Comment argues, there is a strong argument in favor of acknowledging the role of religion in the judicial decision-making process, particularly where religion does not function as the foundation for the decision, but as one within a constellation of values that judges, who are already value-sensitive individuals,¹⁶ consider in order to arrive at a just opinion.

While the saga of Moore's refusal to put law above religion is perfect for the incisive soundbites that thrive in a twenty-four-hour news cycle, placing Moore at the epicenter of the conversation concerning religion and judicial decision-making displaces a far more constructive conversation. A conversation exploring the potential role or influence of religion on the judicial process itself.¹⁷ After all, what

11. U.S. CONST. amend. I.

12. Campbell Robertson, *Roy Moore, Alabama Chief Justice, Suspended Over Gay Marriage Order*, N.Y. TIMES (Sept. 30, 2016), <https://www.nytimes.com/2016/10/01/us/roy-moore-alabama-chief-justice.html> [<https://perma.cc/Y82M-JYBF>].

13. Antonia Blumberg, *Alabama Senate Front-Runner: Evolution Is Fake and Homosexuality Should Be Illegal*, HUFF POST (Sept. 26, 2017), http://www.huffingtonpost.com/entry/roy-moore-religion_us_59c2bd8be4b063b2531781a2 [<https://perma.cc/A7CD-4KS3>].

14. Mollie Reilly, *Alabama Chief Justice Thinks the First Amendment Only Protects Christians*, HUFF POST (May 5, 2014), http://www.huffingtonpost.com/2014/05/05/alabama-judge-christians_n_5267662.html [<https://perma.cc/M4RP-ZFDR>].

15. It is important to distinguish between Roy Moore's popularity as an anti-establishment candidate for U.S. Senate and Roy Moore's removal from judicial office as the result of the findings of Alabama's Judicial Inquiry Commission. Roy Moore's popularity is likely due to a confluence of social and political factors that are beyond the scope of this Comment, yet his popularity is not an indicator of the waning efficacy of judicial inquiry commissions.

16. Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513, 515 (1998).

17. This Comment does not adopt a specific definition of religion, but approaches religion in the same way that Scott C. Idleman does in *The Concealment of Religious Values in Judicial*

judges truly believe, and thus what informs their adjudicatory decision-making, is likely of deeper significance to rulings involving the most foundational aspects of human nature, including the rights to abortion and same-sex marriage, as well as the more mundane rulings involving jurisdictional, procedural, evidentiary, and remedial questions.¹⁸

Before progressing any further, however, I would like to define what exactly this Comment means by “the acknowledgment of religious values in judicial decision-making.” This definition borrows largely from a passage from Senior Judge Kermit V. Lipez’s¹⁹ discussion of religion as a type of formative life experience: “Whatever their life experiences might have been, judges cannot use them to disregard statutory commands, clear precedents and the probative force of evidence.”²⁰ Yet many judicial decisions do not fall neatly into binary categories but are interstitial—filling in gaps where statutory or constitutional law is so general, or the common-law doctrine is so outmoded, that the judge must provide the law with content and context to decide specific cases.²¹

Deciding such cases will inevitably lean on a process that combines logic, analysis, intuition, and common sense, all informed by the judge’s education, career, and cultural identity, which may very well include a religious identity.²² However, this Comment departs from Judge Lipez’s suggestion that transparency—judges explicitly acknowledging the role of religion within the text of their decisions—might be beneficial in certain contexts.²³ Rather, this Comment posits that the *Code of Conduct for United States Judges* (“*Code of Conduct*”)²⁴ and the American Bar Association’s (ABA) *Model Code of Judicial Conduct* (“*Model Code*”)²⁵ should explicitly acknowledge the role of extralegal values in judicial decision-making to provide judges with guidance on the appropriate scope of the role of religion as a legitimate external influence. Judge Lipez’s ideal of total transparency is attractive, but the cost of such transparency would result in a steady stream of appeals—not to mention the recusal and disqualification motions that would plague those judges who

Decisionmaking: “the designation of a system or belief as ‘religious’ may stem largely from the nature of the questions it addresses and the role of the answers to those questions in the life of one who adheres to the system or belief.” 91 VA. L. REV. 515, 517 n.9 (2005) [hereinafter *Concealment*]. Idleman’s approach to religion is most useful because it does not rely on membership to an institutionalized form of religion but embraces the presence of nontraditional spiritual values in an individual’s life that provide a kind of “religious” guidance.

18. See *id.* at 517.

19. Judge Lipez is a senior judge on the First Circuit Court of Appeals. *Kermit V. Lipez*, U.S. CT. APPEALS FOR FIRST CIR., <http://www.ca1.uscourts.gov/kermit-v-lipez> [<https://perma.cc/X49Q-WG9L>].

20. Kermit V. Lipez, *Is There a Place for Religion in Judicial Decision-Making?*, 31 ME. B.J. 16, 20 (2016).

21. *Id.* at 17.

22. See *id.* at 20.

23. Judge Lipez argues that transparency might be beneficial in the context of the sentencing process, where a judge’s religious background might manifest itself in the form of judicial mercy, which undoubtedly serves a legitimate purpose in that setting. *Id.* at 21.

24. CODE OF CONDUCT FOR UNITED STATES JUDGES (JUDICIAL CONFERENCE 2014).

25. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS’N 2011).

dare to author decisions averring religious influence. Consequently, this Comment advocates for limited amendments to the abovementioned codes to initiate transformation in public perception of the role that extralegal values such as religion arguably *already* play in judicial decision-making.

This Comment advocates for the acknowledgment of religious values in judicial decision-making in three parts. Part I explores the role of religion in American politics, and more specifically, the role of religion in federal judicial confirmation hearings and state-level judicial elections. Membership to an institutionalized religion often performs an essential gatekeeping function when it comes to assessing the background or personal values of a candidate for political or judicial office. The initially positive role of religion in judicial selection processes suggests that the practice of refusing to acknowledge the role that religion likely already plays in judicial decision-making is wholly cosmetic. This skin-deep predilection only leads to the concealment of religious values in judicial decision-making, and such concealment benefits neither judge nor litigant.

Part II considers arguments for and against acknowledging the role of religion in judicial decision-making. Specifically, Part II looks to arguments proffered by Judge Lipez, Judge Wendell L. Griffen, Scott C. Idleman, and the late Judge Marion Callister in *Idaho v. Freeman* in favor of acknowledgment, and former New Mexico Supreme Court Justice Gene E. Franchini, Bruce A. Green, and Derek H. Davis in favor of maintaining the faux secular status quo. Part III recommends changes to Rule 2.4 of the *Model Code*, as well as Canons 3(A)(1) and 3(C)(1) of the *Code of Conduct*. I propose adding language to the Comment to Rule 2.4, which governs external influences on judicial conduct,²⁶ to distinguish between appropriate consultation with extralegal sources and inappropriate supplanting of the law with extralegal sources. I propose entirely new commentary for Canon 3(A)(1), which governs a federal judge's performance of her adjudicative responsibilities,²⁷ and Canon 3(C)(1), which governs disqualification,²⁸ respectively, to reiterate two ideas highlighted in this Comment. First, faithfulness to the law does not preclude consultation with extralegal sources; and second, determinations of judicial impartiality are based on the "disinterested observer" standard²⁹—not the perceptions of the parties appearing before a judge.

I. INSTITUTIONALIZED RELIGION AS THE GATEKEEPER TO THE JUDICIARY

At a recent hearing for Amy Coney Barrett of the U.S. Court of Appeals for the Seventh Circuit, formerly a law professor at Notre Dame, Democratic Senator Diane Feinstein expressed grave doubts that now-Judge Barrett would uphold *Roe v. Wade*³⁰ due to her traditional Catholic beliefs.³¹ During that same hearing, another

26. *Id.* at r. 2.4.

27. CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(1) (JUDICIAL CONFERENCE 2014).

28. *Id.* at Canon 3(C)(1).

29. *Idaho v. Freeman*, 507 F. Supp. 706, 727 (D. Idaho 1981).

30. 410 U.S. 113 (1973).

31. Emma Green, *Should a Judge's Nomination Be Derailed by Her Faith?*, ATLANTIC (Sept. 8, 2017), <https://www.theatlantic.com/politics/archive/2017/09/catholics-senate-amy>

Democrat, Senator Sheldon Whitehouse, was visibly irritated that now-Judge Barrett and her fellow nominee, then-sitting Michigan Supreme Court Justice Joan Larsen (now-Judge Larsen of the U.S. Court of Appeals for the Sixth Circuit), were respectively unwilling to discuss the intersection between their personal beliefs and their legal decision-making processes. Senator Whitehouse lamented, “[t]o sit here and pretend that there is no role for people’s personal and private views . . . when they go to the court—it’s just, it’s so preposterous as to be silly.”³²

Senator Whitehouse is correct—such pretensions are preposterous *and* silly. The very fact that Senate hearings on federal judicial nominees even address religion suggests dual realities: that senators recognize there is a high probability that personal values do permeate judicial decision-making, and that membership to normative, institutionalized Judeo-Christian religions frequently serves a gatekeeping function, demonstrating that the would-be judge passes the baseline “trustworthiness” test. If then-Professor Barrett or then-Justice Larsen were, say, card-carrying members of the Order of Bards, Ovates, and Druids, Senators Feinstein and Whitehouse would be expressing their misgivings about other nominees.

Elected judges, too, are implicitly—though perhaps depending on the region, explicitly—required to subscribe to a normative, institutionalized Judeo-Christian religion. According to Wendell Griffen, an Arkansas appellate judge and Baptist minister, “[i]n many instances the candidates for judicial office include their religious affiliation in their campaign materials.”³³ The inclusion of such personal information in campaign materials reveals that not only is the electorate interested in learning such information about their elected officials, but candidates for judicial office perceive a value in revealing such otherwise private information. That religion plays a meaningful role in the lives of millions of people all over the world is hardly a revolutionary statement. One of the reasons that an electorate might be eager to learn about the religious affiliations of candidates for judicial office—and one of the reasons that candidates are generally quite willing to share such information—is so the electorate can use that knowledge to forge an immediate connection with the candidate. I don’t know you and you don’t know me, but we both worship the same (or at least a) God, and that means I can relate to you on a human level.

To illustrate this point, I offer two lines of reasoning. First, atheists are often treated as aberrant. For example, in 2007, only forty-five percent of Americans said they would vote for a qualified atheist presidential candidate.³⁴ A study from the University of British Columbia found that the reason atheists are so disliked boils down to trust.³⁵ The study revealed that people distrust atheists due to the belief that people behave better when they think that God is watching over them, and such self-

-barrett/539124/ [https://perma.cc/3JAN-K92P].

32. *Id.*

33. Griffen, *supra* note 16, at 516.

34. Jeffrey M. Jones, *Some Americans Reluctant to Vote for Mormon, 72-Year-Old Presidential Candidates*, GALLUP (Feb. 20, 2007), <http://news.gallup.com/poll/26611/some-americans-reluctant-vote-mormon-72yearold-presidential-candidates.aspx> [https://perma.cc/QX28-GVN9].

35. Daisy Grewal, *In Atheists We Distrust*, SCI. AM. (Jan. 17, 2012), <https://www.scientificamerican.com/article/in-atheists-we-distrust/> [https://perma.cc/C8DL-CQVN].

consciousness spurs them to comport themselves in more socially acceptable ways.³⁶ Second, when people are at their most vulnerable, religion can serve as a powerful source of guidance and comfort. In the week following the terror attacks on September 11, 2001, research published in *The New England Journal of Medicine* found that sixty percent of Americans attended a religious or memorial service and Bible sales rose twenty-seven percent.³⁷ It makes sense, then, that candidates for judicial office, whether by appointment or election, must claim some religious affiliation if they hope to be successful.

The remainder of Part I turns back to a point made in the first paragraph of this Part, that senators themselves, evidenced by their aggressive questioning of a candidates' religious beliefs, acknowledge that personal values can and do play a role in the judicial decision-making process. On the elective side, the prevalence of religion in judicial campaigns solidifies the same point. Let's begin with the latter. In recent years, emboldened by the rush of big money into judicial elections,³⁸ judicial campaigns have become "nastier, noisier, and costlier."³⁹ Campaigns have become costlier, in part, because there are so many effective mediums through which to reach the electorate. One such medium is television. Anthony Champagne highlights the key themes that judicial candidates seek to impart to prospective voters.⁴⁰ Champagne isolates three unsurprising themes: crime control, civil justice, and family values.⁴¹ Within the theme of family values, Champagne finds that demonstrable religious convictions operate as valuable proxies: one Mississippi candidate highlighted his role as a Baptist deacon when describing his involvement with a child protection program.⁴² An Alabama candidate connected his position as a deacon to his thirty-year marriage.⁴³

On the appointive side, before revisiting the discussion of the Senate hearings concerning Judge Barrett and Judge Larsen, let's take a quick detour into the Senate confirmation hearings of yore. The date is September 14, 2005, and it is the third day of then-Judge John Roberts's (of the Court of Appeals for District of Columbia Circuit) Senate confirmation hearings concerning his nomination to the Supreme Court.⁴⁴ Senator Feinstein, musing about the "role Catholicism would play" in his decisions if appointed to the Supreme Court, asks then-Judge Roberts to reaffirm

36. *Id.*

37. Harold G. Koenig, *Research on Religion, Spirituality, and Mental Health: A Review*, 54 CANADIAN J. PSYCHIATRY 283, 285 (2009).

38. Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 670 (2002).

39. *Id.* (citing Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998)).

40. *See id.* at 675–81.

41. *Id.* at 674–79.

42. *Id.* at 680.

43. *Id.*

44. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. (2005), <https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf> [<https://perma.cc/C8DL-CQVN>].

President John F. Kennedy's statement that the "separation of church and state is absolute."⁴⁵ Then-Judge Roberts declines to do so.⁴⁶ "I don't know what you mean by absolute separation of church and state," he opines, "I do know this, that my faith and my religious beliefs do not play a role in judging."⁴⁷ Senator Feinstein has no follow-up questions on the topic.⁴⁸

Perhaps Senator Feinstein was satisfied with now-Chief Justice Roberts's answer to her question; or, perhaps she just sensed that she was never going to get the answer that she wanted, a simple "yes, Senator." But what is striking about this exchange, and what perhaps never quite gets teased out in the highly polarizing debates surrounding religion and the judiciary, is that when Senator Feinstein contemplates the role of Catholicism in then-Judge Roberts's decision-making process, she is not actually asking whether the separation between church and state is absolute. Catholicism, of course, can play a role in one's decision-making processes even while said decision-maker is "absolutely" capable of separating church and state. And yet she conflates the two questions during her exchange with then-Judge Roberts.

Fast forward twelve years later to September 2017: Senator Whitehouse captures Senator Feinstein's enduring logical fallacy in his frustration with then-Professor Barrett and then-Justice Larsen.⁴⁹ According to Senator Whitehouse, to operate under the pretense that personal values play no role on the bench is laughable.⁵⁰ Yet if either nominee had been so bold as to honestly discuss the interplay between religion and judicial decision-making, they would have shattered the legal blogosphere. While senators, legislators, *and* citizens are aching for real insight into the kinds of considerations, life experiences, and values that go into the judicial decision-making process, the actual confirmation process offers no such insight. The increasingly hostile environment surrounding judicial—particularly Supreme Court and federal appellate court—appointments indicates that legislators and non-legislators alike realize that a potential judge or justice's religious background can often be just as important as their scholarly or professional training.⁵¹ But this begs the question: why are Americans so hell-bent on acting against their own intuition?

The federal appointive process is uniquely unsatisfying in that it can elevate a nominee's religious background to a major point of contention, but then fails to ever provide a mechanism by which that religious background can serve as anything other than a liability. And maybe that nominee's religious background *will* be a liability; maybe her background will prevent her from fair and impartial application of the law. But if that is the case, then the appointment process is the place to exclude such bad actors. If religion comes up on a regular basis in these hearings—and in judicial election campaigns for that matter—then surely it is because religion maintains enduring value in American sociocultural reality.

45. *Id.* at 227.

46. *Id.*

47. *Id.*

48. *Id.*

49. Green, *supra* note 31.

50. *Id.*

51. Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision Making*, 53 CATH. U. L. REV. 709, 713 (2004).

II. AN OVERVIEW OF THE DEBATE SURROUNDING THE ROLE OF RELIGION IN JUDICIAL DECISION-MAKING

A. Against the Role of Religion in Judicial Decision-Making

Before delving into the arguments in favor of and against acknowledging the role of religion in judicial decision-making, it is important to take stock of the rules that those who write against the role of religion in judicial decision-making often cite in their favor. Outside of codes of conduct aimed squarely at regulating judicial actors, critics often cite the Establishment Clause,⁵² the Free Exercise Clause,⁵³ and the Due Process Clause.⁵⁴ This Comment does not address these perceived limitations on the presence of religious values in judicial decision-making because they are enshrined in the Constitution, and the First, Fifth, and Fourteenth Amendments are unlikely to budge in their respective language. Furthermore, cases concerning judicial disqualification motions rarely reference constitutional limitations on religion in judicial decision-making, but generally articulate alleged violations in the language of the ABA's *Model Code of Judicial Conduct* ("Model Code"), the *Code of Conduct for United States Judges*, or 28 U.S.C. § 455, the federal statute regulating the disqualification of federal judges.⁵⁵ Consequently, this Part focuses on the use of rules within these two codes to set up a discussion of the arguments against the role of religion in judicial decision-making.⁵⁶

Rule 2.4 of the *Model Code* governs external influences on judicial conduct.⁵⁷ Section (B) states that a "judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."⁵⁸ Religion does not receive a special shout out in Rule 2.4, but likely falls under "social" or "other" interests. Canon 2(A) of the *Code of Conduct* asserts that a

52. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

53. *Id.* (The First Amendment continues, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

54. *Id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."). Scholars have questioned "whether decisionmaking grounded in religious values or authority can be said to exhibit a rational basis or a legitimate government purpose," and whether the role of religion in judicial decision-making raises notice issues, as the parties may not have knowledge of the values on which the judge is basing her decision. Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537, 556, 558–59 (1998) [hereinafter *Limits*].

55. 28 U.S.C. § 455 (2012).

56. Part III ultimately proposes revisions to both codes to permit acknowledgment of the role of religion in judicial decision-making. Part II discusses § 455 at length.

57. MODEL CODE OF JUDICIAL CONDUCT r. 2.4 (AM. BAR ASS'N 2011). Canon 2(B) of the *Code of Conduct for United States Judges* imparts a similar point: "A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment." CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2(B) (JUDICIAL CONFERENCE 2014).

58. MODEL CODE OF JUDICIAL CONDUCT r. 2.4(B) (AM. BAR ASS'N 2011).

“judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”⁵⁹ Canon 2 addresses impropriety and the appearance of impropriety, and the supplanting of legal precedent with religious text or values à la Roy Moore is a perfect example of Canon 2 impropriety sprung to life.

Finally, the regulations within Canon 3 of the *Code of Conduct* require “fair[], impartial[] and diligent[]” performance of judicial duties.⁶⁰ Canon 3 addresses, among other concerns, a judge’s adjudicative responsibilities, in addition to grounds for judicial disqualification.⁶¹ Religion, while not expressly invoked in the judge’s adjudicative responsibilities, is implied in the “partisan interests” portion of Canon 3(A)(1): “A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.”⁶² Religion is similarly implicitly referenced in Canon 3(C)(1), which requires that the judge disqualify herself in a proceeding in which her impartiality might be questioned.⁶³ Because Canon 3(C) can trigger disqualification not only where the judge is acting in an identifiably partial manner, but where the judge’s impartiality is in question *at all*, the combination of Canon 3(C) and an outwardly religious judge can result in calls for recusal or disqualification.

Both codes clearly have an interest in preserving an impartial judiciary that, to the public eye, operates perfectly free of external influences—whether those influences be social, personal, political, or financial. When it comes to the external influence prong of Rule 2.4, critics are generally accepting of the fact that external influences do exist, and will subconsciously, from time-to-time, if not all the time, enter the judge’s mind.⁶⁴ And yet, according to scholars such as Bruce A. Green, “it does not follow that the judge may consciously draw on these beliefs in making judicial determinations.”⁶⁵ To the extent they enter the judge’s mind, posits Green, “he would be expected to put them to the side and make the decision based exclusively on considerations that the law prescribes.”⁶⁶ Green’s distinction between the subconscious and the conscious when it comes to judicial decision-making is problematic: if a judge is by definition unaware of the influences or experiences at work in her subconscious, then how is she to consciously set those influences or experiences aside? Green’s theory supposes that every judge has a convenient on and off switch that controls her conscious, so that when necessary, she can slip into her personalized philosophical vacuum.

59. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2(A) (JUDICIAL CONFERENCE 2014).

60. *Id.* at Canon 3.

61. *Id.*

62. *Id.* at Canon 3(A)(1).

63. *Id.* at Canon 3(C)(1).

64. See, e.g., Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 34–35 (1997) (“[A] judge’s personal moral and religious beliefs are part of what the judge invariably brings to the decisionmaking process . . . and the judge may be influenced by them subconsciously.”).

65. *Id.* at 34.

66. *Id.* at 34–35.

Former New Mexico Supreme Court Justice Gene E. Franchini echoes Green when he narrates a tale from his time as a New Mexico trial judge.⁶⁷ Rather than adhere to the state's stringent mandatory sentencing law for certain crimes committed while using a gun when he believed doing so would result in grave injustice to the first-time offender standing before him, then-Judge Franchini resigned.⁶⁸ He resigned, in his own words, because he did not want "to impose on any other person—judicial officer or not—[his] personal beliefs of what justice is, or [his] ideas as to its administration."⁶⁹ Franchini certainly made the correct decision—if one cannot follow the law as clearly stated then resignation, recusal, or disqualification are all solid options.

However, what Franchini gets wrong is his equation of *his* personal moral dilemma with the average judge trying to apply the law free of any "personal, religious, or philosophical beliefs."⁷⁰ Franchini, perhaps going even one step further than Green, claims that if a judge cannot "set aside any and all of these factors in the decisionmaking process[,] . . . resignation may be the only remaining option."⁷¹ Franchini did not have a problem with "setting aside" his personal values; he had a problem because he literally wanted to set aside the law to come to a conclusion unsupported by clear-cut sentencing guidelines. Most judges who engage in a value-sensitive decision-making process do not elevate external influences—their personal beliefs, values, and experiences—above the law; rather, they use their individual backgrounds as one of many lenses through which the law can be understood.

Not unlike Rule 2.4, which warns against external influences, Canon 3(A)(1) states that a judge should maintain professional competence in the law and not be swayed by partisan interests.⁷² Professional competence in the law is required, among other reasons, to promote stability and predictability for those appearing before a judge.⁷³ If judges are free to use their religious beliefs in their legal decision-making, how will litigants and lawyers be able to predict or prepare for the outcome of their cases?⁷⁴ Furthermore, the judiciary only represents a limited slice of the multitude of religions practiced in the United States. Allowing judges to use or consult religious teachings in their decision-making would invariably result in the advancement and

67. See Gene E. Franchini, *Conscience, Judging, and Conscientious Judging*, 2 J. APP. PRAC. & PROCESS 19 (2000).

68. *Id.* at 19–21.

69. *Id.* at 21.

70. *Id.* at 25.

71. *Id.*

72. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(1) (JUDICIAL CONFERENCE 2014).

73. Margot G. Benedict, Note, *Curbing Religion's Influence on the Judiciary*, 29 GEO. J. LEGAL ETHICS 793, 798 (2016) ("Allowing religion into decisionmaking would create an unpredictable atmosphere surrounding the courts and would undermine what people think of as the law.").

74. See, e.g., *id.*; see also Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 LOY. L.A. L. REV. 1411, 1419 (1996) ("[O]ne expects judges to rely on arguments they believe should have force for all judges.").

enforcement of a select few religions' ideals in the American legal system.⁷⁵ According to Derek H. Davis, alongside this interest in democratic stability, our political system separates church and state because any government endorsement of religion "sends a message to nonadherents that they are outsiders . . . and an accompanying message to adherents that they are insiders, favored members of the political community."⁷⁶ Such a message, that "adherents . . . are favored members of the political community," would then undoubtedly implicate Canon 3(C)(1), requiring recusal or disqualification *every time* there might be perceived religious asymmetry between party and judge.

But again, such critiques of the dangers of religion in judicial decision-making fail to distinguish between using religious values as one of many values that the judge can account for in arriving at a decision, and using religion as the *sole* value in arriving at a decision. The latter is tantamount to government-endorsed religion. The former is not. Professional competence in the law does not require a judge to act as though the law exists in a vacuum. Law does not exist in a vacuum, just as those who are tasked with applying it do not. In the United States, citizens and noncitizens of all faiths have access to a predominantly Judeo-Christian federal and state judiciary. Religious asymmetry between party and judge is not grounds for disqualification; religious asymmetry is a reality of the American judicial process. Additionally, concerns of stability and predictability are overblown. Well-trained lawyers do all kinds of background research involving judges before whom the lawyers plan to appear. Such research is not an affront to the norms of democracy—it is simply good lawyering.

B. In Favor of the Role of Religion in Judicial Decision-Making

Section B argues three overarching points. The first and second points are interrelated: first, religion parallels secular values that are already acknowledged in judicial decision-making, such as history or economic theory; second, there is an important, but oft overlooked intersection between religious teaching and intellectual traditions. That religion can offer such intellectual merit reinforces the notion that religious values can be as edifying and serviceable as their secular counterparts. Third, this Section contends that despite the limitations on judges' out-of-court religious activities, these limitations are not nearly as pervasive as one might think. State judges are rarely disciplined for their participation in religious activities, and even federal judges are rarely subject to disqualification under § 455 for their religious affiliations.

75. Greenawalt, *supra* note 74, at 1418–19.

76. Derek H. Davis, *Religion and the Abuse of Judicial Power*, 39 J. CHURCH & ST. 203, 208 (1997) (citation omitted).

1. Parallels Between Religious Values and Secular Values

Judge Lipez believes that “religion . . . plays an unacknowledged part in judicial decision-making,”⁷⁷ and “rather than pretending otherwise, [society] should acknowledge that fact and explore its implications.”⁷⁸ The majority of judges (perhaps, at the risk of generalizing, like most Americans) are raised within some religion tradition, and thus it is not feasible to expect that they will shun without qualification that particular aspect of their identity each time they take the black.⁷⁹ Those who oppose engagement with religious values in the judicial decision-making process often cite the fact that the judiciary, in large part, fails to mirror the religious diversity of the citizenry.⁸⁰ However, all judges do not share a communal knowledge or understanding of history, economics, mathematics, science, literature, the arts, or even cultural and social norms.⁸¹ Society does not demand absolute homogeneity of thought or action from its judges—and rightfully so. Just as judges are not expected to disavow their economic, political, philosophical, psychological, historical, or scientific backgrounds at the door when deciding a case, judges should not be expected to disavow their religious backgrounds.⁸²

Judge Griffen echoes the perspective of Judge Lipez.

[If] economic values, social values, values about political ideology and the function of government in human society, and values about risks and benefits can be analyzed and included in the jurisprudential way judges decide cases and controversies, religious values can also be analyzed and included jurisprudentially.⁸³

Religious values can very much be the object(s) of jurisprudential analysis. That religious voices are different from those voices grounded in secular traditions does not make them less articulable, less reliable, or even less susceptible to vigorous debate and open criticism.⁸⁴ In fact, as Judge Griffen argues, perhaps the most effective means by which to regulate the use of religious values in judicial decision-making is to condone their entry into the judicial marketplace of ideas—to allow religious values to be “examined, challenged, debated, and defended as more or less helpful means of reaching just decisions.”⁸⁵

77. Lipez, *supra* note 20, at 17.

78. *Id.*

79. *Id.*

80. See, e.g., Benedict, *supra* note 73, at 798–99.

81. Griffen, *supra* note 16, at 518.

82. *Id.*; see also Idleman, *Concealment*, *supra* note 17, at 521 (“In particular, whether from the standpoint of psychology, theology, or philosophy, it is generally accepted that the religious or religiously-influenced aspects of one’s perspectives or thought processes cannot simply be set aside or excluded, like some form of non-admitted evidence, at least for purposes of addressing or resolving matters of any significance.”).

83. Griffen, *supra* note 16, at 516.

84. *Id.* at 519.

85. *Id.*

2. The Intellectual Value of Religious Teachings and Traditions

Alongside the notion that religion functions as one of *many* values that the value-sensitive judge might consider in her decision-making process, it bears mentioning that religious teachings and values are not unlike their secular counterparts (i.e., philosophy, history, arts, literature) in that religion is not merely a source of “private comfort or irrational insight.”⁸⁶ Scott C. Idleman highlights the intrinsic intellectual value of religious traditions: “Many of the religious traditions in this country are, after all, repositories for centuries of deep reflection upon human nature, society, and ethics—in short, upon the human condition.”⁸⁷ In that vein, even the nonreligious judge may not be able to avoid reliance on religious values, because questions involving religion and morality are so deeply intertwined.⁸⁸ And even where one can identify “deep moral premises” without consultation with religious sources, the religious sources are “undoubtedly of causal significance.”⁸⁹ Religious values, while not universal across all faiths, certainly have significant overlap when it comes to basic themes surrounding human nature and justice.

At the margins of judicial philosophy, consultation with religious sources can be humbling and edifying for the well-meaning judge. Religion is akin to a subset of ideology; but religion, unlike secular ideology, is emboldened by the moral force of faith in the divine. Because of the moral force that often attaches itself to religious ideology, religion is approached not as a positive, rational force, but as a perilous, irrational path down which the likes of Roy Moore would have the judiciary go. Yet it is unfair to disqualify religion as an intellectually feeble enterprise because isolated bad actors like Roy Moore think that the rule of law is inferior to their subjective interpretation of Christianity, or because well-meaning judges such as Gene Franchini conflate an unwillingness to consider other values beyond their individual notions of justice with an unwillingness to recognize the law as is.⁹⁰

Idleman’s basic premise, that religious traditions in the United States are repositories for centuries of profound reflection on the human condition, counters the Moores and Franchinis of the judiciary. There is intellectual weight behind the moral force associated with religious ideology—but the judge making use of religious ideology must be willing and capable to engage with its intellectual aspects. It is worth mentioning that religious *and* secular values do not come into play in every decision. Such values are most useful, as the previous paragraph begins, at the *margins* of judicial philosophy. In those cases that do not fall into binary categories and require the judge to provide the law with content and context, religion should be treated as another source of ideology or secular value that a judge looks to for nonbinding guidance.⁹¹

86. Teresa S. Collett, “*The Kings Good Servant, But God’s First*”: *The Role of Religion in Judicial Decisionmaking*, 41 S. TEX. L. REV. 1277, 1296 (2000).

87. Idleman, *Limits*, *supra* note 54, at 550.

88. *Id.*

89. Kent Greenawalt, PRIVATE CONSCIENCES AND PUBLIC REASONS 147 (1995).

90. See *supra* text accompanying notes 67–71 (discussing Franchini’s decision to resign).

91. Thanks to Professor Charles G. Geyh for helping to flesh out this point.

3. The Myth of the Secular Judge

The final reason that the role of religion should be acknowledged in judicial decision-making is that judges frequently engage in religious activities *outside* their chambers. Even in hot button disqualification cases where the religious affiliations of judges are under the microscope, the outcome tends to favor the judge. This Section discusses a federal disqualification case, *Idaho v. Freeman*,⁹² to illustrate the difficulty that litigants face when attempting to force recusal or disqualification for reasons related to religious affiliation. First, however, this Section briefly highlights a similar phenomenon in the state-court system, where judges may serve in positions within their churches and religious communities.

Numerous state judicial ethics advisory committee opinions appreciate—as opposed to punish—the role that judges can perform as “community leaders through religious organizations, and understand the desire of judges to serve their religious communities as volunteers.”⁹³ The Arizona Judicial Ethics Advisory Committee permitted a judge to “play a prominent role in a religious ceremony or service.”⁹⁴ The Maryland Judicial Ethics Committee permitted a judge to serve as a vestryman (or church council member) for his church.⁹⁵ The Oklahoma Judicial Ethics Advisory

92. 507 F. Supp. 706 (D. Idaho 1981). In addition to *Freeman*, there are numerous significant cases from the lower federal courts that address the issue of religion and disqualification. *See, e.g.*, *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659–60 (10th Cir. 2002) (finding no abuse of discretion in district judge’s refusal to recuse himself from the case because of his membership in the Episcopal church, reiterating that “facts pleaded will not suffice to show the personal bias required by the statute if they go to the background and associations of the judge rather than to his appraisal of a party personally” (quoting *Pennsylvania v. Local Union 542, Int’l Union of Operating Eng’rs*, 388 F. Supp. 155, 159 (E.D. Pa. 1974)); *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984) (denying defendant’s motion to recuse Mormon judge on grounds that lawsuit involved, *inter alia*, the “theocratic power structure of Utah”); *United States v. Odeh*, No. 13-cr-20772, 2014 WL 3767808, at *1 (E.D. Mich. July 31, 2014) (denying defendant’s motion to recuse district judge based on judge’s fundraising efforts on behalf of the Detroit Jewish Federation, a social service organization which distributes some of its funds to provide social services in Israel and other international Jewish communities); *United States v. El-Gabrowny*, 844 F. Supp. 955 (S.D.N.Y. 1994) (a district judge declined to recuse himself from deciding a charge of conspiracy in connection with the World Trade Center bombings in the face of claims that his Jewish faith and alleged ties to Zionism rendered him incapable of serving as an impartial judge); *Menora v. Ill. High Sch. Ass’n*, 527 F. Supp. 632, 634–35 (N.D. Ill. 1981) (a district judge refused to recuse himself in a case seeking to prevent Jewish youth from wearing yarmulkes while participating in interscholastic sports, despite his prior involvement with the American Jewish Congress).

93. Daniel R. Suhr, *The Religious Liberty of Judges*, 20 WM. & MARY BILL RTS. J. 179, 189 (2011).

94. *Id.* at 189 n.63 (citing Ariz. Judicial Ethics Advisory Comm., Op. 93-01 (1993), https://www.azcourts.gov/portals/137/ethics_opinions/1993/93-01.pdf [<https://perma.cc/D2FK-H73L>]).

95. *Id.* (citing Md. Judicial Ethics Comm., Op. 1980-10 (1980), <https://www.courts.state.md.us/sites/default/files/import/ethics/pdfs/1980-10.pdf> [<https://perma.cc/L4CD-WCD8>]).

Panel permitted a judge to serve as the president of the board of directors of a private Christian high school.⁹⁶ To be fair, state ethics boards and panels place defined limits on the religious liberty of judges, particularly where religious affiliations and politics intersect, as well as where judges might use the prestige of their judicial office to garner funds for religious causes.⁹⁷ Yet such limitations seem reasonable, and do not preclude or discourage judges from meaningful involvement within a religious community. The elective side, while still unwilling to locate an affirmative space for religion in the judicial decision-making process, is arguably more willing than the appointive system to acknowledge that religion does have some value beyond functioning as a potential source of bias, as evidenced by the sheer number of advisory opinions that permit religious activity by judges. However, as the following discussion of *Freeman* demonstrates, even the appointive side allows judges to serve within religious communities, and the standard used for disqualification under § 455(a) evinces a reluctance to mandate disqualification based solely on evidence of that service.

In *Freeman*, Arizona and Idaho state legislators brought action asserting the right of the state(s) to rescind ratification of the Equal Rights Amendment (ERA) and challenging the extension of the ratification period.⁹⁸ Defendants, the National Organization of Women (NOW), moved to disqualify U.S. District Judge Marion Callister under § 455, contending that his impartiality might reasonably be questioned because he formerly held the position of Regional Representative in the Church of Jesus Christ of Latter-Day Saints (“Church”), which publicly opposed the ERA.⁹⁹ The court held, *inter alia*, that a judge’s background associations, including

96. *Id.* at 190 n.63 (citing Okla. Judicial Ethics Advisory Panel, Op. 2007-4 (2007), <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=449053>) [<https://perma.cc/2TJS-A6B3>].

97. MODEL CODE OF JUDICIAL CONDUCT r. 1.3 (AM. BAR ASS’N 2011) (“A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others . . .”). *See, e.g.*, Ark. Judicial Ethics Advisory Comm., Op. 94-03 (1994), www.arkansas.gov/jec/opinions/94_03.html (finding that while mere attendance at a church’s annual scholarship fundraising dinner is permissible for a judge, being the guest of honor or a speaker is not); N.Y. Judicial Ethics Comm., Op. 03-75 (2003), www.nycourts.gov/ip/judiciaethics/opinions/03-75.htm [<https://perma.cc/6ABS-CCEV>] (finding that a full-time judge should decline to serve on advisory panel of a religious order that reviews and considers procedures for handling allegations of sexual misconduct by members of the order).

98. *Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981).

99. *Id.* at 729. NOW’s motion to disqualify additionally asserted that the court’s “appearance of impartiality might reasonably be questioned because”:

(1) the Church or its members had been politically active in various parts of the United States in opposing the ERA’s ratification; (2) “[i]n certain states, . . . anti-ERA lobbying efforts were organized and supported by Church Regional Representatives who were purportedly asked by the Church to undertake these tasks”; (3) “Judge Marion J. Callister [wa]s a member of the Church and at the time of the filing of this case was serving as a Regional Representative”; (4) “[a]s a Regional Representative, it was Judge Callister’s duty to assist the general leadership of the Church in the operation of Church programs in the region to

his religious affiliations, should not be grounds for disqualification, and that a trial judge's former position as a Regional Representative in the Church did not require disqualification, despite the fact that Church leaders may have stated their opposition to the ERA, and opposed the extension of the ratification deadline.¹⁰⁰

As the basis for its holding, the court noted that the Church was neither "directly nor indirectly involved in the pending litigation as a party or as an amicus curiae, nor had [it] ever attempted to promote its position on the ERA [through] litigation."¹⁰¹ NOW argued that under the ABA's *Model Code*, a judge should refrain from serving as an officer in any organization whose interest might come before the court—for example, the Anti-Defamation League of B'nai B'rith, the Sierra Club, and the NAACP.¹⁰² The court, however, countered that the Church, unlike the cited advocacy groups, were not single-issue organizations that primarily make use of the judicial system to advance their advocacy goals.¹⁰³ Judge Callister's point that churches, while certainly operating as important loci for ideological exploration, are not at their core advocacy-centric enterprises, is buried in a footnote in his opinion.¹⁰⁴ And while *Freeman* has been the subject of intense discussion for nearly four decades, this point rarely makes the metaphorical airwaves. Judge Callister's holding captures an important distinction between churches advocating for a particular outcome and advocacy groups themselves: churches do not use the courts as the primary vehicle of furthering their social or political agendas—churches use community organization, public outreach, and faith-based education. Conversely, advocacy groups, such as the NAACP, since their inception, have pursued their stated policy objectives (i.e., attacking segregation and racial inequality) through the courts.

Next, the court observed that because NOW conceded that a motion to disqualify based solely upon membership in the Church would be improper,¹⁰⁵ the focal point of the court's inquiry should be "whether there is anything particular about the holding of the position of a Regional Representative in the Church that would require disqualification" under § 455(a).¹⁰⁶ A judge should disqualify herself under § 455(a) "[o]nly when a disinterested observer, knowing all the facts, would determine that a judge's appearance of impartiality could reasonably be questioned."¹⁰⁷ A Regional Representative, the court noted, is one of "limited jurisdiction and circumscribed responsibility," and organizing political lobbying efforts is not part of the

which he was assigned" (including his duties carrying forth the Church's opposition to the ERA); (5) "[t]he Church considers its position on the ERA to be of the utmost importance and those who back the ERA are subject to sanctions, including excommunication, as is evidenced by proceedings taken against the leader of the group 'Mormons for ERA.'"

Id. at 729–30.

100. *Id.* at 729, 733.

101. *Id.* at 731.

102. *Id.* at 731 n.33.

103. *Id.*

104. *See id.*

105. *Id.* at 731.

106. *Id.*

107. *Id.* at 733.

responsibilities of the Regional Representative.¹⁰⁸ If such an act were undertaken, it would be in the representative's personal, rather than Church, capacity.¹⁰⁹

If NOW had succeeded in its disqualification motion, judges would have effectively lost the right to participate in religious communities. Judge Callister's erstwhile role as Regional Representative certainly suggested that he might have *personal* beliefs that did not align with those of NOW, but that role did not preclude him from providing the parties with an impartial forum in which to try their case. After all, the standard for determining whether a judge's impartiality cannot be questioned is not applied from the point of view of the parties, but from the perspective of a disinterested observer.¹¹⁰ That judge and litigant do not share similar religious values is not a sign of judicial bias or lack of impartiality; if such ideological divergence were a sign of bias or partiality, then the robust protections associated with the Free Exercise Clause of the First Amendment¹¹¹ would *not* apply to judges. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."¹¹²

Yet the U.S. Supreme Court has long acknowledged a vital distinction between the "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."¹¹³ Judges are protected by the "freedom to believe" and litigants are protected by the limitations placed on the judges' "freedom to act." Implicit in *Cantwell*'s statement that judges may not act based on their beliefs is the expectation that religious judges have the capacity to separate the outcome suggested by their religious convictions and the outcomes directed by the evidence and relevant law. This Comment argues that an impartial, value-sensitive judge can consult religious values—where religious values would be useful—alongside other secular values to arrive at the outcome directed by the evidence and relevant law. The way the judge interprets and applies relevant law to the evidence is certainly influenced by the judge's upbringing, education, career history, and other formative experiences, including, perhaps, a judge's religious faith.

In his opinion, Judge Callister devoted no space to explaining the role of the Church in his daily life. Yet it is clear, evidenced by his former position as a Regional Representative, that the Church did influence his sense of self. The late Judge Callister's Mormon faith likely impacted his individual choices, personal and professional commitments, and ideological alignments. Fortunately, the laws surrounding disqualification procedure recognize the enduring value of the Mormon faith in his life—even during his tenure as a federal judge. Permitting judges to serve in (albeit somewhat restricted) roles in religious organizations, and then suggesting

108. *Id.*

109. *Id.*

110. See *Parrish v. Bd. of Comm'rs of Ala. State Bar*, 524 F.2d 98, 103, 103–04 (5th Cir. 1975) (en banc) (articulating the test as one where a claim under subsection 455(a) is "supported by facts which would raise a reasonable inference of a lack of impartiality on the part of the judge in the context of the issues presented in a particular law suit").

111. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

112. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990).

113. *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

that the values that underpin those organizations can offer no guidance whatsoever to the judge during the judicial decision-making process makes little sense. It is possible to be deeply devoted to one's religion *and* deeply devoted to the rule of law; it is possible to occupy a position within a religious community *and* not allow that position to dictate an outcome or decision that improperly favors one party.

III. RECOMMENDATIONS

The final Part of this Comment proposes small but targeted amendments to both Rule 2.4 of the ABA's *Model Code*, as well as Canon 3 of the *Code of Conduct*. Because the rules in both codes are themselves succinct and only infrequently subject to change, I suggest an addition to the existing Comment to Rule 2.4 of the *Model Code*, and I suggest the addition of two new commentaries to Canon 3 of the *Code of Conduct*, specifically for Canons 3(A)(1) and 3(C)(1). I do not suggest changes to Canon 2 of the *Code of Conduct* (although I discuss Canon 2(A) in Part II),¹¹⁴ because the objectives of Canon 3—that a judge should perform the duties of office fairly, impartially, and diligently¹¹⁵—are more aligned with the objectives of my proposed changes. Canon 2's focus on the appearance of impropriety is relevant to the influence of extralegal values in the judicial decision-making process, but the Canon, per the Commentary to Canon 2(A), refers primarily to the “judge's honesty, integrity, impartiality, temperament, or fitness to serve.”¹¹⁶ Consequently, Canon 3, which addresses both adjudicative responsibilities (including faithfulness to the law) as well as disqualification,¹¹⁷ is a more appropriate site for proposed changes concerning the role of extralegal values in judicial decision-making. First, faithfulness to the law requires an understanding of when consultation with extralegal sources is permissible; second, improper use of extralegal sources can trigger disqualification.

A. Proposed Amendments to Rule 2.4 of the ABA's Model Code of Judicial Conduct

Rule 2.4 and the Comment to Rule 2.4 state:

Rule 2.4: External Influences on Judicial Conduct

- (A) A judge shall not be swayed by public clamor or fear of criticism.
- (B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.
- (C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

114. See *supra* text accompanying note 59.

115. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (JUDICIAL CONFERENCE 2014).

116. *Id.* at Canon 2(A) commentary.

117. *Id.* at Canon 3.

Comment on Rule 2.4

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.¹¹⁸

As it stands, the Comment to Rule 2.4 does not offer any guidance on the proper use of extralegal values in judicial decision-making. Since Rule 2.4 is *the* rule governing external influences, it should provide guidance on how to distinguish between permissible and impermissible uses of outside influence. I propose adding the following language to the Comment to Rule 2.4. For ease of understanding I have included the existing Comment in regular typeface and italicized the proposed changes.

Proposed Comment to Rule 2.4

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences. *In determining whether judicial decision making is subject to inappropriate outside influences, it is important to distinguish between appropriate consultation with permissible outside influences, and inappropriate use of outside influences as the basis for judicial decision making. Judges come from diverse educational, professional, and sociocultural backgrounds; Rule 2.4 recognizes that judges should not be expected to disavow their backgrounds once they enter the judiciary.*

The proposed language has dual purposes: first, to emphasize the difference between improperly supplanting the law with extralegal sources and properly consulting extralegal sources to better understand the law and achieve the ultimate goal of justice. Roy Moore embodies the former; Judge Lipez, the latter. Second, the proposed language explicitly acknowledges that judges not only come from diverse backgrounds, but those diverse backgrounds are likely to consciously and unconsciously guide their respective decision-making processes. The proposed Comment to Rule 2.4, particularly the last sentence, is a major departure from the stern yet elusive tone of the current Comment. But comments are supposed to provide insight into the rules, and the current Comment offers no gloss on "outside influences." Such an explanatory abyss helps no one—not in the least judges *or* litigants.

118. MODEL CODE OF JUDICIAL CONDUCT r. 2.4, r. 2.4 cmt. (AM. BAR ASS'N 2011).

*B. Proposed Amendments to Canon 3 of the Code of Conduct
for United States Judges*

1. Canon 3(A)(1)

Canon 3(A), in relevant part, states:

Canon 3: A Judge Should Perform the Duties of the Office Fairly,
Impartially and Diligently

The duties of judicial office take precedence over all other activities.
In performing the duties prescribed by law, the judge should adhere
to the following standards:

(A) *Adjudicative Responsibilities.*

(1) A judge should be faithful to, and maintain professional
competence in, the law and should not be swayed by partisan interests,
public clamor, or fear of criticism.¹¹⁹

Canon 3 concerns the performance of adjudicative duties. To help judges perform adjudicative duties in a manner that sustains its objectives—fairness, impartiality, and diligence—Canon 3 must offer a more in-depth articulation of what it means to be faithful to the law than it does at present. As of now, there is no commentary to 3(A)(1). Therefore, my initial proposal is to add commentary; next, within that new commentary, I propose an explanation of “faithful to . . . the law”:

COMMENTARY

Canon 3(A)(1). Faithfulness to the law requires that the judge look to the relevant body of law as the primary source of guidance in judicial decision-making. Yet faithfulness to the law does not preclude consultation with permissible extralegal sources, so long as the permissible extralegal sources do not supplant the relevant source of law as the basis for judicial decision-making.

Canon 3(A)(1)’s commentary should reflect this distinction between “consulting” and “supplanting” to reiterate the notion that judges are value-sensitive individuals. As stated in the introductory portion of this Comment, while there is no need for radical transparency from judges,¹²⁰ there is a need for acceptance and normalization of the fact that judges can and do benefit, particularly at the margins of judicial philosophy, from drawing upon extralegal values in their decision-making processes. For those who might counter that this proposed Commentary to Canon 3(A)(1) offers implicit refuge for the Roy Moores of the federal judiciary, such anxieties are unlikely to materialize. If anything, the saga of Roy Moore is proof that those who demonstrate disdain for the rule of the law will not survive long in judicial office.

119. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (JUDICIAL CONFERENCE 2014).

120. *See supra* text accompanying note 22.

2. Canon 3(C)(1)

Canon 3(C), in relevant part, states:

(C) Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which¹²¹

As of now, there is no commentary associated with Canon 3(C)(1). Because improper use of extralegal values, including religious values, implicates a judge's appearance of impartiality, Canon 3(C)(1) would benefit from an explanation of the precise standard used to determine whether a judge's impartiality has been compromised. Importing the "disinterested person" standard¹²² for disqualification under § 455(a), as applied in *Idaho v. Freeman*, would provide judges, litigants, and the public with a crucial reminder that impartiality in a judge is never determined relative to the litigant, but relative to a well-informed, *disinterested* observer. The proposed Commentary is as follows:

COMMENTARY

Canon 3(C)(1). A judge should disqualify herself or himself only when a disinterested observer, knowing all the facts, would determine that a judge's appearance of partiality could reasonably be questioned.

A party appearing before a judge can find any number of reasons that he or she might feel compromises the judge's impartiality: race or ethnicity, educational and professional background, geographic ties, and the list goes on. Yet *Freeman*'s standard recognizes that parties appearing before a judge are always operating from an inherently "interested" position. To allow parties' interests to dictate the standard for self-disqualification would go against the very principles of natural justice; no man should be a judge in his own cause.¹²³ The famous words of Sir Edward Coke in *Dr. Bonham's Case* reverberate in *Freeman*, in § 455(a), and must do so in Canon 3(C)(1) as well.

CONCLUSION

Perhaps it is no coincidence that this Comment ends with a brief discussion of disqualification. After all, the goal of this Comment is not to argue in favor of relaxed disqualification standards, but rather to make sense of what judicial impartiality

121. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (JUDICIAL CONFERENCE 2014).

122. *Idaho v. Freeman*, 507 F. Supp. 706, 733 (D. Idaho 1981).

123. In *Dr. Bonham's Case*, when considering the claim of the College of Physicians to fine its members for malpractice, the Chief Justice, Sir Edward Coke, declared that the censors of the College "cannot be judges, ministers, and parties . . . *quia aliquis non debet esse Judex in propria causa* . . . and one cannot be a judge and attorney for any of the parties." 8 Co. Rep. 114, 118a (C.P. 1610).

actually looks like in practice. To engage in a productive conversation about judicial impartiality, there must be room for discussion of the fundamental extralegal values that can underpin thoughtful judicial decision-making. Among these values that strongly shape a judge's decision-making process, invariably, lies religion. Instead of shunning conversations surrounding the role of religion in judicial decision-making, or clumsily conflating the presence of religious values in judicial decision-making with a lack of capacity or desire to separate church and state, scholarship concerning judicial decision-making must theorize in support of the value-sensitive judge.